with the intent to outrage the modesty of a woman and the appellant is guilty of an offence punishable under section 354 of the Penal Code.

We alter the conviction to one under section 354 of the Penal Code.

Order accordingly.

Solicitors: *David Marshall.*

RAWTHER v. ABDUL KAREEM

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and and Suffian J.) December 1, 1965]

[K.L. — Federal Court Civil Appeal No. 26 of 1965]

Practice and Procedure — Appeal — Judgment in default of appearance — Application for stay pending application to set aside judgment — R.S.C. 1957, O. 36 rr. 31 and 33.

In this case an application was made for the stay of an appeal on the ground that the judgment was obtained in default of appearance and the defendant wished to apply to have the judgment set aside.

Held: the court had a discretion whether to proceed to hear the case forthwith or to stay it pending an attempt by the appellant to have the judgment set aside and in the circumstances of this case and especially because of the fact that the appellant intended to apply for fresh evidence to be heard, the appeal should be stayed pending application being made to set aside the judgment.

Cases referred to:—

(1) *Vint* v. *Hudspith* 29 Ch.D. 322.

(2) *Armour* v. *Bate* [1891] 2 Q.B. 233.

FEDERAL COURT.

Morris for the appellant.

K. A. Menon for the respondent.

Thomson L.P. (delivering oral judgment): A preliminary point has been taken (and here I choose my words with some care) that we should not proceed with the hearing of this appeal by reason of the nature of the trial to which it is the sequel.

Counsel for the respondent used the expression that the appeal was "incompetent". If by that he meant there was no right of appeal in our view he went too far because clearly by section 67 of the Judicature Act there is a right of appeal from every judgment of the High Court.

The point, however, is this that when the matter came on for trial the defendant, the present appellant, was not present either by himself or counsel until the very last day of the trial which was six months after the hearing of evidence had been completed, when the judge was about to deliver and proceeded to deliver judgment against him. On that it was submitted that the case fell within R.S.C. Order 36, rules 31 and 33.

In our view the present case does fall within these rules but we do not agree that the effect of rule 33 is to make compliance with that rule a condition precedent without fulfilment of which an unsuccessful defendant cannot proceed to appeal. In our view, based largely on the cases of *Vint* v. *Hudspith* (1) and *Armour* v. *Bate,* (2) the true position is that this court has a discretion as to whether to proceed to hear the appeal forthwith or to stay it pending an attempt by the appellant to comply with rule 33. That discretion is to be exercised, of course, on the facts of each individual case and applying our minds to the facts of the present case we consider it relevant that the appellant has very candidly stated that he will inevitably be compelled to make an application for the hearing of fresh evidence. We express no views whatsoever as to the prospects of success of such application. But were such an application to be made and were it to be successful we should then be placed in the position, which would certainly not be conducive to the doing of justice and which might be far from conducive to the appellant's own interest, of having to weigh fresh evidence which we ourselves had heard against other evidence which the trial judge alone had heard.

In the circumstances we are of the opinion that the appeal should be stayed pending an application being made to the High Court under Order 36.

As regards costs, obviously whatever happens the question of costs is going to be very complicated and the question should stand over.

Barakbah C.J. (Malaya) and **Suffian J.** concurred.

Order accordingly.

Solicitors: *Morris Edgar & Co.; Talalla & Menon.*

YONG YOKE SUNG & ORS. v. SUNGEI WAY ESTATE

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) December 1, 1965]

[K.L. — Federal Court Civil Appeal No. 52 of 1965]

Master and Servant — Disobedience — Dismissal of workers for refusal to obey order of transfer and for absenting themselves from work — Breach of contract of service — Reasonableness of order of transfer — Appeal from labour commissioner — Procedure for appeal.

Employment — Breach of contract of service — Dismissal — Employment Ordinance, 1955, ss. 16 and 77(2).

Practice and Procedure — Appeal from labour commissioner — Employment Ordinance, 1955, s. 77(2) — R.S.C. 1957, O. 59 r. 13.

The appellants appealed against the decision of the High Court ([1965] 2 M.L.J. 229) which had dismissed their appeal against the decision of the commissioner of labour who had rejected a claim by the appellants to one month's wages in lieu of notice from their employers,

the respondents. The facts were that the respondents being dissatisfied with the low yields of latex brought in by some tappers transferred a number of tappers (including the appellants) from fields they were then working in to other fields. The appellants refused to accept the transfer and they failed to turn up for work. The respondents then informed them that because of their refusal to obey the order of transfer and because they absented themselves from work they had broken their contract of service and were no longer employees of the estate. They applied for a month's wages in lieu of notice. This application was dismissed and they appealed to the High Court, following the procedure for appeals from the Sessions Courts. By Legal Notice (N.S.) 120 of 1957 however R.S.C. O. 59 r. 13 of the Rules had been applied to such appeals.

Held: (1) the appeal to the High Court should in accordance with O. 59 r. 13 have been brought by way of motion setting out the grounds of appeal supported by affidavit, and if the court so directed at the hearing, by oral evidence, but as leave could have been given in the High Court to amend so that the proceedings could be brought in the proper form, the appellate court would regard the appeal as properly brought and deal with it on its merits;

(2) on the facts the order transferring the workers was not an unreasonable order, was not given *mala fide* and was not unlawful and consequently the appellants were not justified in their refusal to obey it.

Case referred to:—

(1) *Public Prosecutor* v. *Karuppiah* (1913), 1 F.M.S.L.R. 133.

FEDERAL COURT.

P. G. Lim for the appellants.

S. D. K. Peddie for the respondents.

Cur. Adv. Vult.

Thomson L.P.: I have had the benefit of reading the judgment of the Chief Justice in Borneo and I agree that this appeal should be dismissed.

Mr. Yong and those associated with him were parties to a contract under which they undertook to tap rubber trees and in return their employer undertook to pay them wages. Mr. Yong and his associates refused to tap rubber trees, that is to say that they repudiated the contract, and their employer has exercised his undoubted legal right to treat the contract as being thereby at an end. That would seem to be the end of the matter.

In my view the costs should follow the event. As, however, I have considerable doubts as to the forensic position of Mr. Yong's associates and have even graver doubts as to the forensic existence of the Sungei Way Estate it will be necessary for counsel to agree to the form of order. No doubt there is some sort of arrangement between Mr. Yong and his associates and no doubt counsel for the non-existent Sungei Way Estate has in fact had instructions from somebody who does exist. If the form of order cannot be agreed to we shall have to hear argument on a later date.

Pike C.J. (Borneo): In this case the appellants have appealed against the decision of the High Court dismissing their appeal against the decision of the labour commissioner which rejected a claim by the appellants to one month's wages in lieu of notice from their employers, Sungei Way Estate.

The material facts in this case are not in dispute. The respondents became dissatisfied with the low yields of latex which were brought in by their Chinese tappers and on July 25th, 1963, published Exhibit C1 which gave tappers notice of the management's intention to test tap all fields tapped by the Chinese tappers and informed them that if they were not agreeable to continue to work in those circumstances they would on request be paid off immediately with a month's pay. No tappers requested to be paid off and the appellants continued to work until 30th September, 1963.

On September 10th the respondents' manager posted up a notice transferring about 80 tappers (including the 29 appellants) from fields they were then working to other fields. The appellants refused to accept transfer from the fields they were then working i.e. fields 29, 30, 32 and 47 to fields 48/52, and as from October 1st they stopped work.

An approach was made on behalf of the appellants to the respondents' manager with a view to getting the transfer order in relation to the 29 appellants cancelled but the manager made it clear that the order could not be varied. This approach however only took place on the 1st October i.e. after the appellants had failed to turn out for work that day.

A meeting between the management and the appellants took place on the 7th October when the appellants were told that by not working between the 1st October and 7th October they had "dismissed themselves" and their employment had terminated by reason of their absence but that if they went back to work on the 8th October their breach of contract would be overlooked. The appellants rejected this offer and accordingly on the 14th October, 1963, the manager issued Exhibit C2 informing the appellants that because of their refusal to obey the order of transfer and because they absented themselves from work they had broken their contract of service as from 1st October, 1963, and were no longer employees of the estate.

Mr. Peddie, on behalf of the respondents, by way of preliminary objection, argued, as he had earlier before the High Court, that the appeal was never properly before the High Court because the appellants had not followed the procedure laid down by section 77(2) of the Employment Ordinance, 1955, and Order 59 rule 13 of the Rules of the High Court and that by

reason thereof that court had no jurisdiction to hear the appeal and consequently the appeal was not cognizable by this court. The learned judge did not give any ruling on this point but Mr. Peddie conceded, and quite properly so in our view, that had his argument succeeded before the High Court the likely effect would have been that an adjournment would have been granted to enable the appellants to bring the matter before the High Court in accordance with the procedure laid down in Order 59 rule 13.

Having heard argument on this preliminary objection the court indicated that it wished to hear argument on the merits while reserving its decision on the preliminary objection.

To deal first with the preliminary objection.

Section 77(2) of the Employment Ordinance, 1955, reads as follows:—

"Subject to any rules made under section 4 of the Rule Committee Ordinance, 1948, the procedure in an appeal to the High Court shall be the procedure in a civil appeal from a Sessions Court with such modifications as the circumstances may require."

Section 4 of the Rule Committee Ordinance, 1948, has been repealed and replaced by section 4 of the Rule Committee Ordinance, 1955. In each section there was provision for the making of rules for "regulating and prescribing the procedure on appeals from any court or person(s)* to the Court of Appeal or the High Court." Section 12 of the Interpretation and General Clauses Ordinance, 1948, provides that where a provision of any written law is repealed and re-enacted, with or without modification, references in any other written law to that provision must, unless the contrary intention appears, be construed as references to the re-enacted provision.

In section 77(2) of the Employment Ordinance, 1955, therefore, unless a contrary intention is to be found, the reference to section 4 of the 1948 Ordinance must be construed as a reference to section 4 of the 1955 Ordinance. There is nothing either in section 77 or elsewhere in the Ordinance indicating any contrary intention. It seems that the clear intention of the Legislature was that appeals from the commissioner should be regulated by rules of court made under the Rule Committee Ordinance but that until such rules were made the procedure should be the same as for a civil appeal from a Sessions Court with such modificatoins as the circumstances may require. The addition of the words "with such modifications as the circumstances may require" seem to suggest that the Legislature recognized that the interim procedure which they were providing for would not be wholly appropriate and that it was only to ensure that there was no hiatus in the procedure for such appeals that the provision was made.

* In the 1948 Ordinance the singular was used while in the 1955 Ordinance the plural was used.

Miss Lim on behalf of the appellants has invited the court to find that the wording of section 77(2) indicates that the Legislature intended that the procedure in civil cases from Sessions Courts should be followed and that the opening words of section 77(2) should be treated as surplusage. Where, however, a perfectly sensible meaning can be given to words which the Legislature has thought fit to use a court is not entitled to hold that they are mere surplusage.

While it is clear that until by Legal Notice (N.S.) 120 of 1957 Order 59 rule 13 was made the procedure in such appeals would, with such modifications as the circumstances may have required, have been the procedure for civil appeals from a Sessions Court. Since the coming into force in 1957 of Order 59 rule 13 the procedure is in our view clearly that laid down in that rule, namely, that such an appeal must be brought by way of motion setting out the grounds of appeal, supported by affidavit and, if the court so directs at the hearing, by oral evidence.

It follows therefore that the matter was not properly before the High Court but as in the view of this court the success of the argument before the High Court would have resulted in leave being given for the proceedings to be brought before the court in proper form the court decided to hear the appeal on the merits.

Turning now to the merits. It is argued on behalf of the appellants that the order transferring them from the fields in which they were at the date of the order working to other fields was an unreasonable order, that it was given *mala fide*, and that it was unlawful, because it was in breach of section 16 of the Employment Ordinance, 1955, and that consequently the appellants were justified in their refusal to obey it.

There was some evidence that the appellants were experienced tappers, and for the purposes of this appeal it is accepted that they were experienced tappers. It is said that it is unreasonable to expect experienced tappers to tap certain categories of rubber trees which for one reason or another are low yielding — such as for example trees requiring slaughter tapping particularly when the tapping has to be done at a height of 12 feet or more above ground and requires upward cutting. It is also argued that the fact that the wages of the tappers would be less because of the type of trees and the type of tapping is another factor which makes the order of the employer an unreasonable one and that section 16 recognizes this in providing that if the employer is unable or fails to provide on twenty-four days in each month during which the labourer is employed work suitable to his capacity he is bound to pay him wages at the

same rate for each day as if he had performed a day's work.

To deal first with this last point. This provision is intended as a deterrent penalty to an employer minded to keep a labourer available on his labour force without pay. It has no direct relevance in considering the proper interpretation of the earlier provision of the section requiring the provision of work suitable to his capacity though it may be that in considering whether in any particular case work is or is not suitable to a labourer's capacity the pay which it commands may be a relevant factor as indicating that by reason of the smallness of the wage which it commands compared to the labourer's earnings immediately prior to the date when he is required to perform the new task the nature of the new task could not be regarded as suitable to his capacity.

The order clearly is not unlawful unless it is in breach of section 16 of the Employment Ordinance, 1955. Is it unreasonable to require women tappers to do ladder tapping? The evidence is that they were in fact engaged on such tapping on the fields from which they were being transferred though, it is claimed, not such high ladder tapping and downward tapping, not upward tapping. But if this was the appellants' objection then it would have been simple enough to have complained to the manager about it. The evidence is, and it was not in any way challenged, that none of them complained. Ladder tapping is part of the job of tapping and women tappers know that it is required of them. There is evidence in Exhibit C5 (a letter written by the M.P.I.E.A. to the secretary, Selangor State branch of the National Union of Plantation Workers) that the estate would not expect old women or women for any other good reason unfitted for ladder tapping to perform such tapping tasks.

Does the fact that the wages of the appellants (being experienced tappers) would be reduced by reason of the lowness of the yield of the trees and the slow nature of ladder tapping make it unreasonable? The evidence is that a rubber tapper gets a minimum wage for a day's tapping even if he only taps one pound of latex and in addition he receives a certain amount for every pound over a certain minimum — this minimum varies according to whether the trees are of category A, B or C. The evidence is that the appellants were, prior to 1st October, 1963, working in category C fields and the transfer order was to other category C fields but that the yields from the fields to which they were ordered to transfer were lower. It is clear from the evidence of the appellant Yong Yoke Sung who gave evidence on behalf of himself and the other 28 appellants that on previous occasions he had been transferred from high yielding tasks to low yielding tasks and had not considered such an order unreasonable since he had never challenged it. I set out his evidence under cross-examination — it appears at page 15 of the record —

> "Sometimes in Sungei Way Estate I have been changed from high yielding to low yielding tasks.
>
> When tasks were changed previously to 1.10.63 I have never refused to accept the change.
>
> I agree that the manager of an estate has the right to direct any tapper to any task in the estate."

In the absence of any evidence of any term (express or implied) in the contract of a rubber tapper which specified the type of tapping the tapper or a tapper of any particular class was required to do or of a usage of the trade recognizing that certain types of tapping would not be required of any particular category of tapper, the order of transfer cannot be said to be unreasonable. To hold otherwise would have the anomalous and very undesirable result that a rubber estate which had good labour relations and maintained a happy contented labour force from year to year would be at a grave disadvantage since, as all their tappers would have become experienced, they would be unable to order any of them to tap rubber trees which for one reason or another were low in yield.

Next it is said that the order was unlawful because it was given *mala fide* in the knowledge that the tappers ordered to the particular fields to which the appellants were ordered would refuse to work and thereby commit a breach of section 15 by being continuously absent from work for more than one day and by so doing terminate their employment and thus enable the respondents to get rid of workers with whom the respondents were dissatisfied without having to give a month's notice or pay a month's salary in lieu of notice. There is no evidence of this and the fact that on the 7th October, 1963, at a meeting between the respondents and the appellants at which union and labour office representatives were present the respondents offered to overlook the absence of the appellants between the 1st and 7th October if they returned to work on the 8th would seem inconsistent with any such intent.

Finally it is argued that such work is not "work suitable to his capacity" within the meaning of section 16 of the Employment Ordinance, 1955. A rubber tapper is a person engaged to tap rubber trees and if he is provided with the work of tapping rubber trees that work is *prima facie* to be regarded as "suitable to his capacity". This seems to have been the view of the court in the case of the *Public Prosecutor* v. *Karuppiah*,[1] and it is a view with which this court agrees. In that case a labourer, employed as such, was, at the time he was given an order to do some weeding, engaged on rubber tapping.

He refused to obey the order as being unreasonable and not within the scope of his duties. The present case seems to this court to be a *fortiori* since in this case the appellants were engaged as rubber tappers and were transferred from one rubber tapping task to another rubber tapping task. It is said however that because they were experienced tappers it was unreasonable to give an order requiring them to tap low yielding trees which required slaughter tapping at great heights above the ground, the more so since 28 of the 29 appellants were women and the order would result in a reduction of their earnings. There was no evidence that there was any term of their contracts of employment, express or implied, which specifies the type of tapping they were required to do or which exclude any particular type of tapping. Nor was there any evidence of any usage of the trade (if such it may be described) which recognized that experienced tappers would not be required to do certain types of tapping. In the absence of any evidence of one or other of these factors, I am of opinion that the work was suitable to the capacity of the appellants and that the order given appellants was neither unlawful, unreasonable nor unsuitable to their capacity.

For the reasons set out herein, I have come to the conclusion that the learned judge was right in upholding the decision of the labour commissioner and I would dismiss the appeal.

Gill J.: I have had the advantage of reading the judgments of the Chief Justice in Borneo and the Lord President and I agree that this appeal should be dismissed.

I also agree with the order proposed by the Lord President as regards costs.

Appeal dismissed.

Solicitors: *P. G. Lim; Skrine & Co.*

MOHAMED IKHAWAN v. JOHAR & ANOR.

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) December 1, 1965]

[K.L. — Federal Court Civil Appeal No. 53 of 1965]

Damages — Personal injuries — Eye — Loss of sight of left eye — Fracture of cheek bone and humerus — Assessment of damages.

The appellant a boy under 14 years sustained severe personal injuries as a result of an accident in which a Government lorry driven by the first respondent knocked down the bicycle on which the boy was riding. The boy sustained fractures of his left cheek bone and left humerus and was blinded in the left eye. He was still suffering from constant weeping as a result of blockage of the lachrymal duct and had a permanent facial deformity. The trial judge found that the driver of the Government lorry was negligent and awarded $12,500 general damages (*ante* p. 5). An appeal was lodged against the quantum of damages and the defendants cross-appealed against the whole of the decision. The cross-appeal in so far as it related to liability was dismissed. On the question of damages,

Held: (1) the damages awarded by the learned trial judge were too low and he had in particular overlooked the consideration of the increased vulnerability of a one-eyed man;

(2) the court would not have been justified in interfering with the award of $12,500 by the trial judge if the appellant had suffered no more than the loss of his eye but in view of the fact that he would continue suffering from watering of the eye and from his facial disfigurement and that he had an arm disablement for some two years the damages should be increased to $15,500.

Cases referred to:—

(1) *Mason* v. *Williams* [1955] 1 W.L.R. 549, 552.

(2) *Nolan* v. *Dental Manufacturing Co. Ltd.* [1958] 1 W.L.R. 936, 942.

(3) *Scott* v. *Masial* [1959] 2 Q.B. 429, 437.

(4) *Jag Singh* v. *Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463, 466.

(5) *Tucker* v. *Ang Oon Hue* [1959] M.L.J. 115.

(6) *Leong Chin Hong* v. *Chap Yoon Cheong & Anor., unreported* Singapore Civil Suit No. 1211 of 1956.

(7) *Ong Kian Teck* v. *Tung Poh Teck & Anor. unreported* Singapore Civil Suit No. 1166 of 1958.

(8) *Pahang Lim Siong Motor Co. Ltd.* v. *Cheong Swee Khui* [1962] M.L.J. 29.

(9) *Bloomfield* v. *British Transport Commission* [1960] 2 Q.B. 86.

(10) *Bastow* v. *Bagley & Co. Ltd.* [1961] 3 All. E.R. 1101.

FEDERAL COURT.

H. E. Cashin for the appellant.

Au Ah Wah (Treasury Solicitor) for the respondents.

Cur. Adv. Vult.

Thomson L.P.: This is an appeal in proceedings arising from a road accident which occurred on a bridge crossing the Sungei Tanjong Karang on 29th January, 1963, in broad daylight.

The appellant, who at the time was a boy of just under 14 years of age, was riding his bicycle along the bridge when a heavy Government lorry which was being driven over the bridge in the same direction came into contact with him or his bicycle causing him to fall whereby he sustained severe personal injuries.

In consequence of this occurrence the boy suing by his father as next friend, commenced the present action against the driver of the lorry and the Government as his employer.

It was the case for the boy that the lorry was being driven negligently and that it was in consequence of this that the accident occurred. The negligence was said to have consisted *inter alia* in failing to keep a proper look out, failing to observe the presence of the boy and failing to stop in time to avoid the collision.